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John P. Sampson; Attorney for Respondent.
Pete N. Vlahos; Vlahos and Sharp; Attorney for Appellant.

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UTAH COURT OF APPEALS
BRIEF
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IN THE SUPREME COURT OF THE

KET NO. 860099-CA STATE OF UTAH

EDWARD A. RICHE,

Plaintiff and
Respondent,

v.

NORTH OGDEN PROFESSIONAL CORPORATION, a Utah Professional Corporation,

Defendant and
Appellant.

860099-CA
Case No. 20477

BRIEF OF RESPONDENT

Appeal from the Judgment of the District Court
in and for the County of Weber, State of Utah
THE HONORABLE JOHN F. WAHLQUIST
DISTRICT COURT JUDGE

JOHN P. SAMPSON, ESQ.
2650 Washington Boulevard
Suite 102
Ogden, Utah 84401
Attorney for Plaintiff
and Respondent

PETE N. VLAHOS, ESQ.
VLAHOS & SHARP
2447 Kiesel Avenue
Ogden, Utah 84401
Attorney for Defendant
and Appellant

FILED
JUN 7 1985
Clerk, Supreme Court, Utah

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BRIEF OF RESPONDENT

STATEMENT OF ISSUES PRESENTED ON APPEAL

The issues presented by this Appeal by Appellant are:

1. That the Appellant (Corporation) had the right to the redemption of its stock by virtue of a Stock Redemption Agreement and by reason of the restriction of transfer of corporate stock in Article XII of the Articles of Incorporation.

2. That the Respondent was a disqualified person to hold shares in a Medical Professional Corporation, in that the Respondent is not a licensed medical practitioner.

3. That the Respondent is barred by the statute of limitations in seeking a liquidation and dissolution of the Corporation.

The issues presented on appeal by Respondent are:

4. That the appeal should be dismissed for the reason that the interlocutory order is not a final order from which an appeal can be taken.

5. That the Statute of Limitations has run against the Corporation in exercising the right of redemption.

6. That the Respondent should be permitted to liquidate the Corporation and take all the receivables since the date of the filing of bankruptcy for purposes of the liquidation.

STATEMENT OF FACTS

Defendant/Appellant, a professional Corporation, employed Dr. Richard E. Nilsson, who was a stockholder. Dr. Nilsson filed bankruptcy, first Chapter 13, and then Chapter 7, in 1976. Thereafter, the bankruptcy court sold the shares of stock in the Corporation. Plaintiff/Respondent purchased the stock and, because he was not a qualified person, sought to dissolve the Corporation. The trial court determined that the Plaintiff/Respondent was the owner of the stock

and ruled that the Corporation had not redeemed the stock within the contract or statutory period. The court further ruled that the parties should proceed to liquidation of the Corporation. Defendant appealed.

ARGUMENT

POINT ONE

PURPOSE OF SUIT FOR DISSOLUTION

To recover value of investment.

Since owner of the stock was not a professional, the only alternative was to dissolve the Corporation and take out the real value.

The amount of the assets of the Corporation were reflected in the income not in the property of par value. Since the Corporation owned the accounts receivable, the real value was the income generated by the employee doctors over the years.

Present value of the accounts receivable would approximate 400,000 of which Plaintiff/Respondent would own 49.75%. This is but one of the assets to be distributed in the dissolution.

The case is not complete. No dissolution has yet occurred. The appeal is premature and should be disallowed.

The Statute of Limitations has not run, for the contract was an executory contract and the statute would not begin to run until the onset of the execution

of the contract. Here, where the right to redeem did not commence until the time for sale, (R1), no claim can be made that the statute of limitations had run. The commencement of the lawsuit for purposes of dissolution was well within the statutory period of the right of redemption. (July 15, 1983, R4). Said commencement of suit tolls the running of the statute since liquidation is an alternative to redemption under the terms of the contract and the statute (16-11-13).

To argue that the statute began to run at the date of the filing of bankruptcy, which Appellant seems to be doing, is to argue that the stock was available for redemption by Appellant at the time of bankruptcy. Not so, the asset was in the hands of the trustee who did not offer it for sale until 1982. At the time of the sale by the trustee the ninety (90) days began to run. When no redemption occurred during that period the statute of limitations on dissolution (or liquidation) began. (R441, line 21-25). The suit was commenced some thirteen (13) months later. Note that the statute, 16-11-13, UCA 1953, requires the fair market value of the shares of stock must be paid. The trustee was not obligated to sell for par. The price of sale was not the fair market value, for said value must be fixed at the

time of liquidation. For the purposes of this Appeal, Respondent alleges that the fair market value is the value of the stock, leasehold, equipment and, of greatest worth, all of the retained profit in the form of accounts receivable for the years from the date of purchase or bankruptcy until the time of dissolution (liquidation).

Nilsson continued to be an employee of the Corporation after his bankruptcy. His earnings belonged to the Corporation and he received a salary (R444, line 19-20). All expenses were paid by the Corporation from the receivables. Dr. Nilsson owned 49.+ percent of the assets of the Corporation. At sale, his interest passed to the owner of the shares, which Respondent makes no claim that the Corporation can continue with him as the professional, yet he can and does claim that either through purchase or liquidation he is entitled to 49.+ percent of the assets, including the receivables.

Appellant raises the statute of limitation as an affirmative defense and sets the time for the commencement of the statute at the time of the disqualification of the doctor. The facts ring loudly against that premise. Dr. Nilsson continued to work as a physician; he continued to assert an ownership in the Corporation until the date of the actual sale of the stock. Until that date, the stock was not owned by a "disqualified"

shareholder. Nilsson had not died; he had not retired; he had simply placed his stock in the hands of the bankruptcy trustee who exercised no control nor ownership over said stock until the date of sale. The Appellant cannot claim a right which did not exist under the agreement or the statutes until the substitution of Respondent for Nilsson. That occurred on the date of sale. (September 20, 1982) (R75). Indeed, the shares of stock were not transferred to Respondent until the commencement of the suit, subject to this appeal, as per the order of the bankruptcy judge, dated November 9, 1982, (R77). Under the terms of the redemption agreement and under the statute, disqualification does not occur until: (1) sale (R57), (2) termination of employment or, (3) death. Since Nilsson continues to be employed (has not died) the qualifier in this case is "sale." The restrictions of the sale are such that the company may, prior to any such sale, redeem said stock at par value. (R59). Note: "prior to any such sale . . . ." Since the sale was unique and Appellant takes the position that the Statute of Limitations had already run on the legal exercise of their rights or the rights of the trustee, the entire redemption concept was passe'. If the Statute of Limitations had run, then no disqualification of Respondent could occur; no right of redemption

could occur except as set by the legislature. 16-11-13, UCA.

Nilsson was not disqualified until he lost his shares by sale to Respondent. If, as the Appellant would have us believe, the statute commenced to run as of the date of the filing of bankruptcy, then the right of redemption, the entire agreement under which the Appellant claims ownership of the stock, was outlawed by the statute of limitations in 1980. Since a sale did not occur until October 19, 1982, the disqualifications, under the redemption provisions of the statute (16-11-13, UCA), did not occur until the sale. Certainly the claim by the Appellant that the trustee became the owner of the shares cannot stand. Ownership, under the terms of the agreement, statute, or common law, came about only by purchase. All legal proceedings under contemplation or under way are stayed by the filing of bankruptcy.

See §454, Bankruptcy, 9 Am Jur 2d, where it is said,

> Thus, the Bankruptcy Code of 1978 provides for an automatic stay of virtually all activities adversely affecting the debtor or debtor's property. To insure that prejudice resulting from this stay are minimized, the code also provides for relief from the stays and for a tolling of limitation which might otherwise cause the availability of the stayed remedies to lapse.

Certainly, the bankruptcy act may not be used to defeat claims by permitting a debtor to stay proceedings and then escape said proceedings by saying at the propitious time, "I'll dismiss my bankruptcy action, for the Statute of Limitations has now run on your claim." This seems to be the obvious claim by the Appellant here.

On the other hand, if the statute did run, the right of redemption asserted in the statute and the private agreement is moot since no offer of redemption was made within ninety (90) days. Thus, Judge Wahlquist was correct in his finding that the order was interlocutory and there remains the necessity of liquidation or dissolution which the lawsuit is all about. (R3).

POINT TWO

APPELLANT HAD RIGHT TO REDEMPTION OF SHARES OF STOCK PREVIOUSLY ISSUED TO A QUALIFIED HOLDER.

Appellant had a right to redeem. Of that there can be no question. Said right was created under the statute (16-11-13) and under a private agreement. In each case, the redemption period was ninety (90) days. Arguendo ninety (90) days from date of bankruptcy (July 9, 1976, August 2, 1976) (R159), or ninety (90) days from sale to Respondent (September 20, 1982), (R75). Appellant did not attempt to redeem within

either period. (R355, line 8-17, R403, line 19-24, R406).

Since no exercise of that right was made within the ninety (90) day period, either of transfer to the trustee or sale to Respondent, Appellant cannot now be heard to assert a right which was limited to ninety (90) days, both by the private agreement and by statute. If such a right existed, it has long since been extinguished by operation of law.

POINT THREE

A STOCK REPURCHASE AGREEMENT IS NOT AN UNREASONABLE RESTRAINT ON THE ALIENATION OF PROPERTY.

If a stock repurchase agreement sets a value and a limit as to its exercise, there can be no doubt that such an agreement is not a restraint of trade. The statute fixes a date of such redemption at bargain and fixes said redemption date as ninety (90) days from sale or disqualification. If no exercise is made of the bargain purchase, then the statute says that the liquidation of the Corporation is the only alternative. "If the Corporation shall fail to purchase said shares by the end of said ninety (90) days, then . . . any disqualified shareholder may bring an action . . . to order the liquidation of the Corporation." (16-11-13, UCA). This the Respondent has done.

The liquidation (dissolution) has yet to occur and thus the Supreme Court should remand to the District Court for dissolution or liquidation.

POINT FOUR

APPELLANT ALLEGES THAT AFFIRMATIVE DEFENSE OF AN EQUITABLE ESTOPPEL, WAIVER AND RES JUDICATA ARE DETERMINATIVE IN DENIAL OF CAUSE OF ACTION IN RESPONDENT.

Certainly, Respondent has not waivered in his determination to liquidate the Corporation, acquire such assets as he might and obtain what he could not obtain by reason of the bankruptcy action by the Appellant. As a result of the bankruptcy filing, Respondent lost a substantial amount of money. As a result of his dogged persistence in purchase of shares, attempts to liquidate and obtain his share of his Corporation, he is not guilty of any act giving rise to estoppel. At the time of the purchase of the shares, confirmed by the Court in November, 1982, Respondent waited until appeal time ran (from Judge Mabey's ruling) until redemption time ran, and until efforts to settle on an amicable basis with his fellow shareholders and then filed his suit to dissolve. Judge Mabey suggested just such an activity in his transfer of the issue relating to the entitlement of said stock itself to the court wherein litigation may be commenced between the parties.

The issue of estoppel, failure to file briefs, or other arguments counsel raises as to Respondent's obtaining of the stock were settled by Judge Mabey in the November 1982 Order on Order to Show Cause. (76-77). Those issues were raised in the hearing before Judge Mabey and disposed of by the Judge.

The issues presented by this appeal by Respondent are:

POINT FIVE

THAT THE APPEAL SHOULD BE DISMISSED FOR THE REASON THAT THE ORDER IS NOT A FINAL ORDER FROM WHICH AN APPEAL CAN BE TAKEN.

As set forth in Judge Wahlquist's ruling, dated January 25, 1985, (R332) Judge Wahlquist viewed the orders as intermediate orders and not therefore appealable.

POINT SIX

THAT THE STATUTE OF LIMITATIONS HAD RUN AGAINST THE CORPORATION IN EXERCISING THE RIGHT OF REDEMPTION.

Since on the date of the filing of bankruptcy, the ownership of stock passed to the trustee in bankruptcy the six year statute of limitation (78-12-23, UCA) written instruments and their enforcement began to run against the Corporation.

Such statute was not tolled by the bankruptcy against the Corporation, only against the bankrupt. Thus, the Corporation had a maximum of six years to

exercise the option granted under the written agreement. Since no effort was made to redeem during that period, the Corporation lost its right to redeem under the written instrument or contract. Under the statute, the right to redeem was lost ninety (90) days after the stock was passed to a disqualified stockholder. (16-11-13, UCA).

POINT SEVEN

THAT THE RESPONDENT SHOULD BE PERMITTED TO LIQUIDATE THE CORPORATION AND TAKE ALL RECEIVABLES SINCE THE DATE OF THE FILING OF BANKRUPTCY FOR PURPOSES OF THE LIQUIDATION.

Since the suit from which this appeal is taken is for the dissolution (liquidation) of a professional corporation, and since the issue on appeal seems to be only that the stock could be redeemed at par, the observe of that issue is which is the "fair" value of the stock for purposes of liquidation as set forth in 16-11-13. The fair value concept, as contemplated by the statute, had to do with the total value of the Corporation. Such liquidation is governed by procedured means of establishing value. Par is not the price; fair value establishes the price or what is available for distribution after liquidation as set forth in 16-10-92 and 16-10-93, UCA.

The statute further provides that in the dissolution of a corporation, the property and assets remaining,

after payment of claims and debts, shall be distributed to its shareholders. Strict accounting of all property and assets must occur from the time Nilsson was first disqualified (the date of filing bankruptcy) until the date of liquidation. No other action would satisfy the statute with respect to dissolution.

CONCLUSION

Judge Wahlquist stated that the orders and decree from which this appeal is taken were intermediate and that the matter was not yet ripe for appeal. Appellant claims that the court was wrong in ratifying the sale by the bankruptcy court and that, further, Plaintiff/Respondent had no claim on the Corporation beyond the par value of the stock. The trial court correctly analyzed the relationship between the parties and ordered further proceedings to result in a liquidation of the Corporation. Respondent now suggests that this Court should uphold Judge Wahlquist's ruling and return the matter to the District Court for dissolution and liquidation.

Respectfully submitted this 6th day of June, 1985.

JOHN P. SAMPSON, ESQ.
2650 Washington Boulevard
Suite 102
Ogden, Utah 84401
Attorney for Plaintiff
and Respondent

Certificate of Mailing

Comes now counsel for the Plaintiff and Respondent and certified to the Court that ten (10) copies of the Respondent's Brief were posted or delivered to the Clerk of the Supreme Court of the State of Utah, 332 State Capitol Building, Salt Lake City, Utah 84114, and that four copies were mailed Defendant and Appellant, by posting same in the U.S. Mail, postage prepaid and addressed to Pete N. Vlahos, 2447 Kiesel Avenue, Ogden, Utah 84401, this 6th day of June, 1985.

John P. Lampros
SECRETARY